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No. 91-453

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari
To The Supreme Court
Of The State Of South Carolina

PETITIONER'S BRIEF ON THE MERITS

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court dated February 11, 1991, including the dissenting opinion of Justice Harwell (concurred in by Justice Chandler), is reported at 404 S.E.2d 895 (S.C. 1991), and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App."), at 1.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated June 17, 1991, has not yet been reported, and is reprinted in Pet. App. at 32.

The opinion and judgment of the Court of Common Pleas, Charleston County, Special Judge Patterson presiding, filed August 14, 1989, was not reported, and is reprinted in Pet. App. at 33.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the South Carolina Supreme Court of February 11, 1991. This Court granted the Petition for Certiorari on November 18, 1991. *Lucas v. South Carolina Coastal Council*, No. 91-453 (Petition for Certiorari granted) (Nov. 18, 1991). The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The South Carolina Beachfront Management Act, 1988 Act No. 634, S.C. CODE ANN. § 48-39-10 *et seq.* (Supp. 1990), as amended by 1990 Act No. 607, is set forth in Pet. App. at 42.

STATEMENT OF THE CASE

A. David Lucas's Property.

In December 1986, the Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina. *Lucas v. South Carolina Coastal Council*, Order filed Aug. 14, 1989 (Court of Common Pleas), at 1, *reprinted at* Pet. App. 33 [hereinafter "Common Pleas Order"]. He paid $975,000 for both pieces of property, which were zoned single-family residential. *Id.* at 1, Pet. App. 33. Lucas intended to build a house on each property, one for his own family and one for resale. *Id.* At the time Mr. Lucas purchased the parcels, there were no state, county, or municipal regulations which would have hindered him in constructing the planned homes. *Id.* at 1, Pet. App. 33-34.

The two parcels were separated by an intervening lot, upon which a home had already been built in the early 1980s. *Id.* at 4, Pet. App. 36. There were also homes on the other side of each lot. Mr. Lucas's property line is situated at approximately 300 feet from the ocean, as measured from the mean high-water mark. *Id.* There have been only occasional occurrences of beach erosion in the vicinity of the Lucas properties, and none after 1983. *Id.* at 5, Pet. App. 37.

B. The South Carolina Beachfront Management Act.

On July 1, 1988, South Carolina's Beachfront Management Act, S.C. CODE ANN. § 48-39-250 *et seq.* (Supp. 1990), came into force [hereinafter "the Act" or "1988 Act" or, if

context permits, "the regulation"]. The Act spells out the South Carolina legislature's findings and intent in some detail, but it is also important to know that the Beachfront Management Act was intended to supplement an earlier statutory enactment on Coastal Zone Management, 1977 Act No. 123, *codified at* S.C. CODE ANN. § 48-39-10 *et seq.* (1987) [hereinafter "1977 Act"]. The 1977 Act was manifestly intended to indicate South Carolina's participation in the federal Coastal Zone Management Act programs. *See id.* §§ 7(C) & 8, *codified at* S.C. CODE ANN. §§ 48-39-20(C) & 48-39-80 (1987); *see also,* Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* (1988). The 1977 Act also created the South Carolina Coastal Council, the Respondent in this Case [hereinafter referred to as "Council"], and charged it with substantive duties. 1977 Act No. 123 at §§ 4 & 5, *codified at* S.C. CODE ANN. §§ 48-39-40 & 48-39-50 (1987).[1]

The 1977 Act limited new development in the "critical areas" of the coastal zone, except for that building authorized by permits issued by the Council. *Id.* § 13, *codified at* S.C. CODE ANN. § 48-39-130 (1987). This "critical area" was defined to include "(1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean front sand dunes." *Id.* § 3(J), *codified at* S.C. CODE ANN. § 48-39-10(J) (1987). Because the 1977 Act restricted only new development in that area beyond the "front row of dunes adjacent to the Atlantic Ocean," *id.* § 3(I), *codified at* S.C. CODE

[1] The composition and powers of the South Carolina Coastal Council were later altered in amendments adopted in 1990, 1990 Act No. 607, §§ 6 & 8, *codified at* S.C. CODE ANN. §§ 48-39-40 & 48-39-50 (Supp. 1990).

ANN. § 48-39-10(I) (1987), it did not affect the lots that David Lucas would later purchase in 1986.[2] The 1977 Act also indicated that such regulations under the Act should not be so "unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of [South Carolina] or of the United States." 1977 Act § 2(C), *codified at* S.C. CODE ANN. § 48-39-30(C) (1987).

The 1988 Beachfront Management Act extended the "critical areas" protected from new development to a zone drawn from the mean high-water mark of the ocean to a setback line established by the Council. 1988 Act, at § 4, *codified at* S.C. CODE ANN. § 48-39-10(J) (Supp. 1990). The Beachfront Management Act expressly stated that the beach/dune system along the South Carolina coast was important for "provid[ing] the basis for a tourism industry," for "provid[ing] a habitat for numerous species of plants and animals," for "protect[ing] life and property by serving as a storm barrier and . . . contribut[ing] to shoreline stability in an economical and effective manner," as well as "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." 1990 Amendments to Beachfront Management Act, 1990 Act No. 607, § 1(1), *codified at* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990) [hereinafter "1990 Amendments"].

The South Carolina legislature sought, therefore, to "discourag[e] new construction in close proximity to the

[2] Common Pleas Order at 1, Pet. App. 33-34.

beach/dune system and encourag[e] those who have erected structures too close to the system to retreat from it." *Id.* § 1(6), *codified at* S.C. CODE ANN. § 48-39-250(6) (Supp. 1990). The Council was then charged with implementing a forty-year retreat policy by drawing setback lines along the coast. 1988 Act, § 3, *codified at* S.C. CODE ANN. § 48-39-280 (Supp. 1990). The setback line was drawn at a distance of forty (40) times the average annual erosion rate, as measured from the top of the primary sand dune at the beach. *Id.* § 3(B), *codified at* S.C. CODE ANN. § 48-39-280(B) (Supp. 1990).[3]

According to the Act, no new construction or reconstruction is allowed seaward of the setback line. *Id.* § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). The one exception to this dictate is the construction of a "wooden walkway no larger in width than six feet." *Id.* § 1(A)(1), *codified at* S.C. CODE ANN. § 48-39-290(A)(1) (Supp. 1990). Other kinds of amenities may be constructed beyond the setback line (including wooden decks, public fishing piers, structures which enhance

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[3] In other words, if the average erosion rate for a part of the coast was ten (10) feet per year, then the setback line would be drawn at a distance of 400 feet from the top of the primary sand dune. At a minimum, the setback line had to be drawn at least twenty (20) feet from the top of the dune. 1988 Act, § 3(B), *codified at* S.C. CODE ANN. § 48-39-280(B) (Supp. 1990).

In Mr. Lucas's case, the Council drew a twenty-foot setback *not* from the primary sand dune, but along a 1963 vegetation line that was located along a road servicing the subdivision. Historically, the beach has been accreting rather than eroding where Mr. Lucas's lots are located. South Carolina Supreme Court Transcript [Tr.] at 70-71, J.A. 5-6. Lucas did not challenge the manner in which the setback line was drawn.

access, golf courses, and swimming pools), provided that a permit is granted by the Council. *Id.* § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) and (C)(3) (Supp. 1990).

In addition to amplifying the legislature's intent in passing the law, as discussed above, the 1990 Amendments sought to provide procedural remedies previously unavailable to property owners affected by the Act. The 1990 Amendments allowed an aggrieved property owner to seek a special permit from the Council in order to build or rebuild a structure seaward of the baseline. 1990 Amendments, § 3, *codified at* S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1990). A special permit may not be granted where the planned construction is on a primary oceanfront sand dune or on the active beach. Moreover, a property owner in applying for a special permit covenants to remove the offending structure if the Council so orders because it is "detrimental to the public health, safety or welfare." *Id.* The 1990 Amendments also established the standard of judicial review for Council actions challenged in South Carolina courts. The legislature provided that the

> "court shall determine whether the prohibition so restricts the use of property as to deprive the owner of the practical uses of it and is an unreasonable exercise of the police power and constitutes a taking without compensation. The burden of proof is on the petitioner as to ownership, and the burden of proof is on the State to prove that the prohibition is not an unreasonable exercise of police power."

Id. § 3, *codified at* S.C. CODE ANN. § 48-39-305(A) (Supp. 1990).

C. Judicial Proceedings.

After the passage of the Beachfront Management Act in 1988, the Council drew a setback line behind Lucas's properties, thus precluding him from constructing residential buildings and other permanent structures thereupon. It was apparent that the Council would not alter the lines or issue a special permit, even if such a variance had been available under the 1988 Act. Tr. at 108-109, J.A. 7-8. Lucas filed an action in the Court of Common Pleas, Charleston County, claiming that the Act so restricted his ownership rights that it amounted to a taking of his property without just compensation in violation of both the South Carolina and United States Constitutions. *See Lucas v. South Carolina Coastal Council,* (Complaint filed Jan. 5, 1989), at ¶ 11; *reprinted at* Pet. App. 153, at 156.

The trial court, Patterson, J., presiding, found that the Act had worked a permanent and total loss in the value of Lucas's property. Common Pleas Order, at 5, *reprinted at* Pet. App. 37. The trial court found that "the prohibition on construction imposed on the[] two lots is permanent" and that the Council had stipulated that the setback lines are "final . . . and will not be moved." *Id.* Judge Patterson also found that "the imposition of building restrictions . . . imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." *Id.* The trial court awarded Lucas $1,232,387.50 in compensation. *Id.* at 8, Pet. App. 40. Judge Patterson concluded his Order by noting that "since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any

incumbrances," once the State had paid the just compensation stipulated. *Id.*

The Council appealed. The South Carolina Supreme Court reversed, holding that the Act did not work a taking requiring compensation under either the state or federal constitutions. *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 898-902 (S.C. 1991). In the majority opinion, the supreme court examined the Beachfront Management Act and said:

> "As applied to the two Lucas lots, the Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a small deck or walkway."

Id. at 896.

On June 17, 1991, the South Carolina Supreme Court rejected Lucas's Petition for Rehearing. A Petition for Certiorari from the Supreme Court of South Carolina was filed in this Court on September 13, 1991. The Petition was granted on November 18, 1991.

SUMMARY OF THE ARGUMENT

This case invites the Court to revisit regulatory takings law. The South Carolina Supreme Court has repudiated the recent jurisprudence of this Court by converting a complex inquiry into a bright-line test which ignores private interests in property affected by state regulation. In holding that the South Carolina Beachfront Management Act does not effect a regulatory taking of Petitioner's coastal property, the South Carolina Supreme

Court ruled that the state need only prove that it is acting pursuant to its legitimate police powers in order to evade the constitutional duty of just compensation. This ruling is contrary to the recent holdings of this Court and is utterly subversive of takings jurisprudence.

This case does not involve the physical occupation by the State of private property. Nor does this case touch upon the quantum or modalities of "just compensation." Finally, Petitioner does not seek to challenge the public wisdom of the South Carolina Act. The South Carolina Supreme Court improperly chose to view Petitioner's position on this last issue as conceding not only the rightful exercise of the state's police power for land-use regulation, but also as an admission that Petitioner's intended use of his land amounted to a nuisance. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898, 900 (S.C. 1991).

Petitioner first submits that the so-called "nuisance exception" to the Takings Guarantee has been broadly misunderstood. Developed as a corollary to challenges of regulation based only on due process grounds, it has no place in the modern jurisprudence which views extreme forms of regulatory takings as violative of the Just Compensation clause of the Fifth Amendment. The categorical nature of the nuisance exception – which would deny compensation whenever a legislature finds that a certain activity poses a public hazard – cannot be reconciled with the approach taken by this Court in "as applied" challenges of regulatory takings since at least 1922.

Should this Court decide that some vestige of a nuisance exception exists, Petitioner next submits that it

must be doctrinally limited. In cases where the value of property is totally taken by regulation, a court's denial of just compensation cannot be justified either in judicial precedent or sound public policy. It is undisputed in this case that the entire value of Mr. Lucas's two coastal lots was taken by operation of the South Carolina law.

Finally, not all exercises of a state's police power are directed against nuisances, and the Petitioner maintains that his desire to build private residences on beachfront property is not a nuisance that would legitimize a state regulation having the effect of depriving him of all use of his property. There must be an objective standard by which legislatures identify nuisances, and thus regulate away the value of property without compensation. Otherwise, the states' broad police powers could insulate *all* land-use regulations from challenges under the Takings Guarantee.

ARGUMENT

I. THE CONSTITUTION'S TAKINGS GUARANTEE SHOULD NOT BE QUALIFIED BY AN EXCEPTION FOR NUISANCES.

The fundamental premise of the judgment of the South Carolina Supreme Court, on review here, is that David Lucas by conceding that the Beachfront Management Act was a valid exercise of the state's police power also admitted that his planned use of his property was a nuisance, and that he was thus not entitled to just compensation under the Constitution's Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898,

900 (S.C. 1991). The critical problem with the South Carolina Supreme Court's application of a nuisance exception is that it simply short-circuits any attempt to balance private rights and public interests. Allowing a legislature to qualify a land-use activity as a nuisance, and thus deny compensation, subverts the Fifth Amendment's command that "private property [shall not] be taken for public use without just compensation." U.S. CONST., amend. V.

A. In Cases of Regulatory Takings by States, Any Nuisance Exception Was Intended to Qualify the Due Process Clause of the Fourteenth Amendment, Not the Takings Guarantee.

The South Carolina Supreme Court relied on a short line of cases which have been argued for the proposition that a regulatory taking of property need not be compensated when the regulation "exists to prevent serious public harm." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991). This line of authority includes *Mugler v. Kansas*, 123 U.S. 623 (1887); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

Each of these cases will be reviewed in some detail elsewhere in this brief, but it is important to indicate here that at the time the first three of these cases were decided, the concept of a taking of property *by regulation* had not actually been recognized. Until this Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), a property-owner's claim that a federal or state regulation had diminished the value of land did not merit treatment

under the Fifth Amendment's takings guarantee. Such claims fell rather under the due process clause of the Fifth Amendment (if against the federal government) or the due process clause of the Fourteenth Amendment (as against the states). *See, e.g., Reinman v. Little Rock*, 237 U.S. 171, 176 (1915) (a regulation will be upheld when the state's police power "is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment."). Such analysis required only that the regulation be rationally related to the "protection of the health, morals, and safety of the people." *Mugler v. Kansas*, 123 U.S. at 668. As this Court in *Mugler* clearly indicated

> "[Police power legislation cannot] come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

Id. at 669.

The *Mugler* case confirmed that regulatory takings of property would be reviewed only under the standard of substantive due process then prevalent in 1887.[4] Prior to *Lochner v. New York*, 198 U.S. 45, 53 (1905), the notion of a state's police power was as expansive in 1887 as it is

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[4] For some of the scholarly literature on this point, *see* Connors, *Back to the Future: The "Nuisance Exception" to the Compensation Clause*, 19 CAP. U. L. REV. 139, 150-51 (1990); Reznick, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 869 (1973); Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 57 (1964).

today. *See, e.g., Barbier v. Connolly,* 113 U.S. 27, 31 (1885) (upholding law prohibiting operation of laundry at night); *Railroad Co. v. Richmond,* 96 U.S. 521, 529 (1877) ("[a]ll property within the city is subject to the legitimate control of the government. . . . Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition."). In effect, there was no "nuisance exception" at all during the *Mugler* era. The only way a land-use regulation could be struck down was by proving that it was not a legitimate exercise of the police power and thus did not further a legitimate state interest. *See Curtin v. Benson,* 222 U.S. 78, 86 (1911); *Lawton v. Steele,* 152 U.S. 133, 137 (1894).

B. A Categorical Nuisance Exception Flatly Contradicts the Court's Modern Regulatory Takings Jurisprudence.

This Court's decision in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), along with its antecedent, *Block v. Hirsh,* 256 U.S. 135 (1921), revolutionized this area of law. Justice Holmes's opinion in *Pennsylvania Coal* is justly famous for its statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. *Pennsylvania Coal* was the first case in which this Court invalidated a land-use regulation as violative of the Takings Guarantee, because it substantially diminished the value of private property. *Id.* at 413. In the earlier decision of *Block v. Hirsh,* the Court upheld a regulation (an early form of rent control) by ruling that it did *not* go too far in diminishing the value of private property. 256 U.S. at 154-56.

Although this Court has applied a variety of tests to determine if just compensation is due under the Fifth Amendment, it has remained true to the *Pennsylvania Coal* principle that private rights cannot be ignored, even in the face of legitimate state interests in regulating the use of land. As this Court has recently indicated, the Takings Guarantee was designed "not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (original emphasis). In short, examining the public interest in regulation carries the court across only one of the hurdles erected by the Fifth Amendment, which *presumes* that a taking is "for public use." U.S. CONST., amend. V. The next hurdle is to ascertain the impact of the regulation on the individual property-owner.

Each of the legal tests developed by the Court to identify a regulatory taking honors both private rights and public interests. In *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the Court pointed to "several factors that have particular significance," including

> "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . [Also relevant] is the character of the governmental action."

Id. at 124 (citations omitted). Refining the *Penn Central* factors, this Court said in *Agins v. Tiburon,* 447 U.S. 255

(1980), that a land-use regulation may effect a taking if it does not "substantially advance legitimate state interests" *or* if it "denies an owner economically viable use of his land." *Id.* at 260. Seven years later, the Court reaffirmed this formulation: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins*, 447 U.S. at 260). *See also Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981) ("A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land' . . . ").

In later pronouncements, the Court has indicated that the two-part *Agins* test should be used only in facial challenges of regulations, while the three-prong *Penn Central* factors should be reserved for cases in which a regulation is challenged as applied to a certain parcel of land (as is true here). *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel*, 452 U.S. at 295. Nevertheless, the clear import of both standards is that it is not enough for a state to show that a legitimate exercise of police power supports the regulation. In addition, the precise character of the regulation needs to be examined, and it must also be shown that the regulation did not severely prejudice the economic interests of the property-owner, particularly investment-backed expectations.

The South Carolina Supreme Court's opinion made clear that it made no difference *how much* the Petitioner's ownership interest in his coastal property was affected by

the 1988 Act. Relying on language from this Court's decision in *Keystone*, the South Carolina Supreme Court ruled that Lucas's purported concession (that his planned construction of a home was a nuisance) sufficed to establish an exception to the Constitution's Takings Guarantee. *Lucas*, 404 S.E.2d at 900-01. The South Carolina Supreme Court read Keystone as overruling both *Agins* and *Penn Central* (and their progeny) to the extent that they required that the owner's economic interests in property be assessed in light of the value lost as a result of the regulation. *Id.* Curiously, the South Carolina Supreme Court characterized Lucas's position, in urging the application of the *Penn Central* factors, as extremist. It would, that court said, make "*wholly* irrelevant" the question of the state's legitimate exercise of its police powers. *Id.* at 900 (original emphasis).

Keystone cannot be intelligibly understood to mean that the factors articulated in *Penn Central* are to be jettisoned in "as applied" challenges of regulatory takings. *Keystone*, after all, implicated a *facial* challenge of the Pennsylvania coal subsidence statute, the antecedent of which was the subject of Justice Holmes's opinion in *Pennsylvania Coal v. Mahon*. *See Keystone*, 480 U.S. at 478. This Court actually did employ the test articulated in *Agins*, which was appropriate to facial challenges of regulatory takings. This Court plainly decided that the state of Pennsylvania had a legitimate interest in enacting its law *and* that the claimant had failed to "make a showing of [sufficient] diminution of value. . . . " *Id.* at 492-93. This Court made clear that it was applying the *Agins* test, and not any categorical nuisance exception of *Mugler* and its descendants. *Id.* at 485.

Although the South Carolina Supreme Court interpreted the *Keystone* Court's review of the second *Agins* prong as surplusage, *Lucas*, 404 S.E.2d at 901 n.4, it seems clear that this Court was attempting in *Keystone* to reconcile the *Mugler* line of authority with the elements articulated in *Agins*, but only for the purpose of handling facial challenges. In such cases it would be difficult, if not impossible, for claimants to establish the "economic impact of the regulation" and its "interfere[nce] with distinct investment backed expectations." *Penn Central*, 438 U.S. at 124. One might infer from the Court's reasoning that the burden was on a claimant primarily to attack the regulation as an illegitimate exercise of a state's police power. In short, the Court in *Keystone* reconciled the *Mugler* line of authority by integrating it into the first prong of the *Agins* test: the assessment of the legitimate state interests implicated by the regulation.

Keystone clearly cannot be read to mean that a claimant whose property has already been affected by regulation has to prove *both* illegitimate state interest *and* substantial diminution of value. This would be to twist the language of the Fifth Amendment into a guarantee merely that just compensation will be paid for private property only where it is *not* taken for a public use. This is not what the Constitution says. To read *Keystone* in the fashion the South Carolina Supreme Court has suggested would mean that "as applied" challenges of regulatory takings would be adjudicated merely in accordance with due process and without regard to the Fifth Amendment. This would be to overrule *Pennsylvania Coal v. Mahon*, which established that regulations which go "too far," 260

U.S. at 415, are subject to just compensation under the Fifth Amendment.

Petitioner maintains that when regulatory takings are considered under the Just Compensation Clause of the Fifth Amendment, a categorical nuisance exception cannot be maintained. Petitioner agrees that it is conceivable that such an exception (which looks exclusively at the nature of government regulation) could be integrated into the *Agins* two-part test for facial challenges, as the court in *Keystone* suggested. It cannot, however, be reconciled with the rule for "as applied" challenges propounded in *Penn Central*, confirmed in *Nollan* and *Hodel*, and, ultimately, derivative from this Court's 1922 opinion in *Pennsylvania Coal*.

II. ANY NUISANCE EXCEPTION SHOULD NOT APPLY WHEN THE REGULATION ELIMINATES THE WORTH OF PROPERTY.

The rule that Petitioner proposes to this Court is that the enforcement of land-use regulations which have the effect of eliminating the value of private property should be *per se* subject to the just compensation requirement of the Fifth Amendment. The key defect in the South Carolina Supreme Court's decision was its complete indifference to the impact of the 1988 Act on Mr. Lucas's property. This case presents an undisputed occasion where the entire worth of a parcel was taken by regulation.

The South Carolina trial court expressly found that the entire value of Mr. Lucas's two lots was eliminated by the regulation. Judge Patterson found that the Act had

worked a permanent and total loss in the value of Lucas's property. Common Pleas Order, at 5, *reprinted at* Pet. App. 37. The trial court also found that "the prohibition on construction imposed on the[ ] two lots is permanent" and that the Council had stipulated that the setback lines are "final . . . and will not be moved." *Id.* Judge Patterson also found that "the imposition of building restrictions . . . imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." *Id.* These findings were not disturbed by the South Carolina Supreme Court. In fact the Court found that the regulation prohibited any use save "a small deck or walkway." *See Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 896, 901 (S.C. 1991).

When property is rendered valueless by regulation there is no basis either in precedent or public policy for allowing a state to evade its duty of just compensation under the Fifth Amendment.

A. A Nuisance Exception Has Never Been Applied in Cases Where the Value of Property Was Totally Eliminated by Regulation.

Even assuming that a nuisance exception to the Takings Guarantee is relevant to challenges of regulatory takings, there is no precedent for the proposition (asserted by the South Carolina Supreme Court) that just compensation can be denied in cases where the value of property was virtually eliminated by the application of the regulation. Looking first to the quintet of so-called

"nuisance exception" cases decided in this Court,[2] it is apparent that none featured a regulation which eliminated the value of the property as the South Carolina Act did in the case of Mr. Lucas's two coastal lots.

As already discussed, *supra* at 12-14, *Mugler v. Kansas,* 123 U.S. 623 (1887); *Reinman v. Little Rock,* 237 U.S. 171 (1915); and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), are not even doctrinally relevant. Once again, those three cases were decided prior to *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), and its decision to treat regulatory takings under the Just Compensation Clause. *Id.* at 413-15. They can hardly stand for the notion that in "as applied" challenges, a court's finding of a legitimate exercise of police power ends the analysis under the Takings Guarantee. This obviously sufficed for challenges of state regulations under the Fourteenth Amendment. The Takings Guarantee, as already noted, requires more.

The three pre-*Pennsylvania Coal* cases are factually inapposite as well. *Mugler* concerned an 1881 Kansas statute prohibiting the manufacture of intoxicating liquors. 123 U.S. at 654-57. The defendants in the case owned breweries, the operation of which was enjoined by the Kansas legislation. *Id.* at 656-57. The Court in *Mugler* made clear that no other uses of the property were restricted:

> "A prohibition simply upon the use of property for purposes that are declared, by valid

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[2] *See Mugler v. Kansas,* 123 U.S. 623 (1887); *Reinman v. Little Rock,* 237 U.S. 171 (1915); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915); *Miller v. Schoene,* 276 U.S. 272 (1928); and *Goldblatt v. Hempstead,* 369 U.S. 590 (1962).

> legislation, to be injurious to the health, morals or safety of the community, cannot [be challenged]. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests."

Id. at 669.

In *Reinman*, the city ordinance in question prohibited the establishment of livery stables within a certain four-block area. 237 U.S. at 172-73. Again there was no question that the claimant's property could be put to other uses under the ordinance. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the ordinance under review had been issued by the city of Los Angeles, and restricted the operation of a brickyard or brick kiln. *Id.* at 404-05. The claimant averred (but nowhere on the record was this confirmed) that his property was worth $800,000 before the regulation, and $60,000 after it came into force. *Id.* at 405. The Court in *Hadacheck* took some pains to liken the Los Angeles regulation to that enacted by Little Rock in *Reinman*, going so far as to say that both claimants had a "like investment in property, encouraged by then conditions; a like reduction of value and deprivation of property . . . [and] a like assertion of an arbitrary exercise of the power of prohibition." *Id.* at 410. More significantly, the U.S. Supreme Court agreed with the California Supreme Court's determination that the Los Angeles ordinance did not "absolutely deprive the owners of a real property within such limits of a valuable right incident to their ownership." *Id.* at 412 (*quoting Ex parte Kelso*,

82 P. 241 (Cal. 1905) (an earlier California decision striking down a San Francisco ordinance which categorically prohibited the operation of a quarry)). It seems plain, therefore, that the Court in *Hadacheck* did not believe that the value of the claimant's property had been so substantially diminished.

Of greater relevance are those cases decided after *Pennsylvania Coal* in 1922. *Miller v. Schoene*, 276 U.S. 272 (1928), is often cited for the notion that the *Mugler* line of authority survived Justice Holmes's decision in *Pennsylvania Coal*. Indeed, this Court has previously made this suggestion. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490-91 (1987). Nonetheless, the clear reading of *Miller* is that the plaintiff in error never raised a Just Compensation claim; his sole argument was under the due process clause of the 14th Amendment. *Miller*, 276 U.S. at 277. And, once again, there was no question in this case that the enforcement of Virginia's Cedar Rust Act, so as to require the claimant to cut down the infected cedar trees on his property, *id.*, did not work even marginally to diminish the value of Plaintiff's land. *Pennsylvania Coal* is nowhere cited in *Miller*, and one might validly assume that the question of substantial diminution of value was not even presented.

The decision in *Miller* is also completely consistent with a parallel line of cases decided by this Court on zoning regulations. It is to this line of cases that *Miller* primarily refers. *See id.* at 279-80 (*citing inter alia, Euclid v. Ambler Realty*, 272 U.S. 365 (1926)). The Court, in deciding *Miller*, must have determined that regulations which did not "go too far," to use Justice Holmes's formulation in

Pennsylvania Coal, 260 U.S. at 415, simply did not implicate the Takings Guarantee. Likewise, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), also features a Fourteenth Amendment challenge to a city ordinance. *Id.* at 591. In this case, the town of Hempstead restricted dredging and pit excavating. *Id.* This Court held that "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Id.* at 594. Moreover, the *Goldblatt* Court noted that had the regulation substantially taken the value of the land, just compensation would have been due under *Pennsylvania Coal*. *Id.*

This Court, as suggested above, has been consistent in its treatment of the problem of land-use regulations. If the quintet of so-called "nuisance exception" cases are merged with the zoning cases beginning with *Welch v. Swasey*, 214 U.S. 91 (1909) and *Euclid*, 272 U.S. 365 (1926), a clear pattern emerges. When a land-use regulation only marginally impacts the value of private property, the more forgiving standard of due process is used. But at some point along the continuum, a taking occurs and Fifth Amendment just compensation is triggered. If all of these cases are plotted along the continuum, there is no decision which says that payment of just compensation can be avoided where virtually all of the value of land has been taken by regulation.

As for *Keystone*, this Court's 1987 decision reviewing the successor statute of the coal subsidence law featured in *Pennsylvania Coal*, it was again made clear that the claimant had failed to show substantial diminution in value. *Keystone*, 480 U.S. at 492-93 (claimants had "failed to make a showing of diminution in value sufficient to

satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases."). Chief Justice Rehnquist, in dissent in *Keystone*, noted that:

> "[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation."

Id. at 513 (Rehnquist, C.J., dissenting).

A majority of courts that have revisited this issue after *Keystone* have concurred with this proposition.[3] Among the cases in the federal Courts of Appeals so agreeing are *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), in which the Ninth Circuit noted that:

> "We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property."

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[3] For representative decisions of state supreme courts, *see Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted).

Id. at 676. Two recent decisions of the Federal Circuit have ruled likewise. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits total destruction of property rights without compensation"); *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990) ("We favor . . . the position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation.").[4]

The Fourth Circuit's recent decision in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *reprinted at* Pet. App. 158, also presented a challenge of South Carolina's 1988 Beachfront Management Act. *Id.* at 166-68. This case concerned two sets of claimants. One class of property-owners was prohibited from *re*building homes on their property by virtue of section 1(A) of the 1988 Act. *See* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). Citing *Keystone* for the proposition that a land-use regulation may constitute a taking if it does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land, *Keystone*, 480 U.S. at

[4] Although *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987), seems to be the only case interpreting *Keystone* to deny just compensation even where a regulation takes all the value of property, *id.* at 915, a careful reading reveals that this was merely *dictum*. *Empire Kosher* was a case involving a quarantine of diseased poultry, and so was like *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of diseased cedar trees). *Empire*, 816 F.2d at 909-11. The Third Circuit held that the USDA regulation did not substantially diminish the value of the poultry. *Id.* at 915-16.

485 (*quoting Agins*, 447 U.S. at 260), the *Esposito* court examined the economic impact of the rebuilding prohibition of the 1988 Act. *Esposito*, 939 F.2d at 169-70. The Fourth Circuit held that the claimants had failed to show that the prohibition on *re*building their homes worked a substantial diminution in the value of their property, since there was no requirement that existing structures had to be demolished. *Id.* at 170.[5] Implicit in the Fourth Circuit's approach was a rejection of the idea that *Keystone's* analysis ended with a finding that a land-use regulation advanced a legitimate state interest.

[5] The other set of claimants in *Esposito*, led by Mr. Chavous, raised the same claim as presented here by Mr. Lucas: that the Act's prohibition of building *any* structures beyond the setback line was a taking. The Fourth Circuit ruled that this claim had been mooted by subsequent changes in the Beachfront Management Act, 1990 Act No. 607, *codified at* S.C. CODE ANN. § 48-39-290(D) (Supp. 1990). *See Esposito*, 939 F.2d at 171.

Section 48-39-290(D) of the Act was adopted on June 25, 1990, more than two years after the Council had drawn the setback lines which prevented David H. Lucas from building on his property. For the two years prior to the 1990 amendments to the Act, the Petitioner was thus without *any* administrative remedy. During this two year period, the regulatory taking of the Council could not have been relieved by any remedy, save for judicial review. Under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this temporary taking suffices to defeat any assertion that a State's regulation did not ripen, for purposes of justiciability, into a compensable action. *Id.* at 314-22. *First English* modified *Agins v. Tiburon*, 447 U.S. 255 (1980), and its progeny, to the extent those cases purported to deny review of temporary

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The Constitution requires more than a proper exercise of the police power for a state to evade its duty of providing just compensation. The economic impact of the regulation on the property must also be reviewed. The fact that no case has decided to deny compensation where there has been a total elimination of value indicates that the fundamental principle of the Takings Guarantee has not been diluted by a nuisance exception.

B. There is No Public Policy Justification for Recognizing a Nuisance Exception in Cases Where the Value of Property Was Totally Eliminated by Regulation.

1. Environmental Objectives Have Been Achieved by Land-Use Regulations Which Fall Short of Rendering Property Worthless.

Petitioner submits that South Carolina's 1988 Beachfront Management Act is aberrant in totally precluding development in the beachfront area. This does not mean

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regulatory takings claims for lack of finality. *See First English*, 482 U.S. at 311-12. Mr. Lucas's case is in precisely the same posture as that of the petitioner in *First English*.

The South Carolina Supreme Court, in rendering its judgment in this case of February 11, 1991, did not consider the impact of the 1990 amendment in providing administrative relief to property owners. The Council sought to brief this issue, but this request was denied by that court. The South Carolina Supreme Court thus implicitly held that Mr. Lucas had a ripe claim for compensation under the Constitution's Fifth Amendment.

that Petitioner now challenges the public policies underlying the Act. Petitioner wishes to point out that relatively few other federal, state, or local environmental prohibitions would be affected by the Court's decision that just compensation is due in this case. Only a very small number of such regulations, when actually applied to particular parcels, have the effect of eliminating the total value of the property.

The 1988 South Carolina Act (as amended in 1990) eschews a confiscatory policy in every respect other than the one at issue here: its categorical prohibition of building beyond the setback line. *See* 1988 Act, § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). This categorical prohibition is logically inconsistent with the 40-year "retreat" policy articulated in the Act's legislative findings, 1990 Amendments, § 1(6), *codified at* S.C. CODE ANN. § 48-39-250(6) (Supp. 1990), and the earlier expressed concern to avoid burdensome regulations that would result in takings. 1977 Act, § 2(C), *codified at* S.C. CODE ANN. § 48-39-30(C) (1987). Despite the apparent inconsistency, Petitioner believes that the South Carolina legislature can be given the benefit of the doubt on this point.[6] Nonetheless, this Court could still decide that the

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[6] To its credit, the South Carolina legislature sought to soften the impact of the building prohibition by allowing, in its 1990 Amendments, a special permit process for property-owners seeking variances. 1990 Amendments, § 3, *codified at* S.C. CODE ANN. 48-39-290(D)(1) (Supp. 1990). As noted above, *supra* at 7, these special permits are heavily conditioned.

As for Mr. Lucas, the Respondent had earlier indicated that no variance would be granted in his case. Trial Stipulation ¶ 16, J.A. 3-4; Tr. at 108-109, J.A. 7-8.

regulation at issue here is peculiar. A holding that it (and similar regulations) constitute takings, would not, therefore, seriously disrupt state and federal environmental protection efforts.

Petitioner does not doubt that there are a host of innocuous regulations which, when applied to particular plots of land, become confiscatory. But, generally speaking, Petitioner is not aware of many classes of environmental regulation which go so far as the South Carolina 1988 Act in barring all development of private property, and essentially mandate that the land be left in its natural state for the benefit of the public. As for federal legislation in this field, a few examples might be illustrative.

At the outset, it is important to realize that both Congress and the executive branch have been mindful of the importance of limiting the confiscatory impact of environmental regulations. In Executive Order 12630, signed by President Reagan on March 15, 1988, 53 Fed. Reg. 8859 (1988), *reprinted at* 5 U.S.C.A. § 601 app. (1991), this concern was manifest. The purpose of the Order was to provide guidance to federal agencies in the drafting of regulations, and the Order warned that "governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." *Id.* § 1(a). Among these regulations were those "imposed on property that substantially affect its value or use." *Id.* § 3(b).

In Petitioner's judgment, no federal environmental legislation would be affected if this Court were to decide that a complete diminution in value constitutes a *per se* taking. The much-discussed, federal wetlands legislation

and regulation do not categorically prohibit all use of affected parcels. Under section 404 of the 1977 Clean Water Act (CWA), 33 U.S.C. § 1344 (1988), a comprehensive permit system was created for wetlands. In a constitutional challenge to this provision of the CWA, this Court noted that the permitting system envisioned for wetlands protection did not deny "other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985). Certain activities do not even require permits under this CWA provision, including farming and ranching. *See* 33 C.F.R. § 323.4 (1991).[7]

Likewise, federal flood plain controls would be unaffected by a ruling that land-use regulation which goes too far requires compensation under the Fifth Amendment. The federal scheme for combatting this hazard is illustrative of good policy. The National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973 (with its amendments of 1977), all *codified at* 42 U.S.C. §§ 4001-4128 (1988), do not categorically ban the construction of structures in flood plains or other areas in

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[7] Although state regulation of wetlands is more advanced than the federal scheme, *see* N. Robinson, *Environmental Regulation of Real Property* § 11.03[1], at 11-7 (1990), most state regulations do not purport to ban all development within wetlands. These exemptions include those activities which do not have any significant or irreversible impact on wetland values. *See, e.g.*, CONN. AGENCIES REGS. § 22a-39-3.1 (1990); MINN. STAT. ANN. § 105.391(3) (1990); N.Y. COMP. CODES R. & REGS. tit. 6, § 665(7)(g) (1990).

which the risk of flooding is high. Instead, this federal law requires that states and municipalities identify flood-risk areas, and that landowners purchase flood insurance if they wish additional federal aid. The sanction for building in a flood plain is the denial of cheap, government-subsidized, flood insurance. *See* 42 U.S.C. § 4106 (1988).[8] Like wetlands protections, the federal flood-plains legislation has been upheld against a facial constitutional challenge, *see, e.g., Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1021-31 (D.D.C. 1978), *aff'd*, 598 F.2d 311, *cert. denied*, 444 U.S. 927 (1980), although this Court has recognized that state flood-plain building restrictions, made pursuant to the federal scheme, could constitute a regulatory taking. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Once again, the point is that few environmental regulations have the effect of denying all "economically viable use" of private property, as per the formulation of *Agins v. Tiburon*, 447 U.S. at 260. Most have, therefore, withstood facial challenges. And most would be unaffected in "as applied" contexts as long as there was no showing by the claimant that the value of the property had been virtually eliminated by the regulation.

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[8] The 1973 Flood Disaster Protection Act also required that before a federally-supervised lending institution provided a mortgage on a home that flood insurance be procured by the buyer. This requirement was dropped in the 1977 amendments. *See* Pub. L. No. 95-128, 91 Stat. 1145 (1977).

2. The Burden of Confiscatory Environmental Regulation Should Fall on Society and Not on Individual Property Owners.

Petitioner is not unmindful of the costs for government involved in the *per se* rule of regulatory takings. If South Carolina is truly intent on promoting tourism and recreation along its shore, as it suggested in the Beachfront Management Act, *see* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990), it must be prepared to compensate landowners if it insists that they may not develop their property and must leave it in its natural state. This compensation will not be cheap. David Lucas's two parcels were estimated in value by the trial court to be worth in excess of $1.2 million. Common Pleas Order, at 8, Pet. App. 40. Apparently the South Carolina legislature recognized this and made the decision to incur the cost. 1977 Act 518, *codified at* S.C. CODE ANN. § 48-39-180 (Supp. 1990).

Society clearly values coastal property. Americans love the beach. To live at the shore is desirable. For those same reasons, the state is entitled to regulate the coastal zone and to make this wonderful resource available to the public. Petitioner agrees that individual property owners may have to endure some regulation in order to balance the public's interest in this resource with their own property rights. But, as already noted, South Carolina's legislation goes too far. South Carolina has, in effect, requisitioned coastal property and has forced property owners to convey to the state the most basic elements of property-ownership. For most South Carolina shore-dwellers this process will be slow, and perhaps even painless, as the Act's 40-year retreat policy begins to

work. In Mr. Lucas's case, the deprivation in property rights was immediate and total.

In *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the cornerstone of this Court's modern regulatory takings jurisprudence, Justice Holmes noted that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416. In reply to this admonition, this Court has later referred to the notion of "reciprocity of advantage," also mentioned by Justice Holmes. *Id.* at 415. This is the idea that a regulated landowner receives some benefit from the restrictions placed on the use of his property. *See, e.g., Keystone*, 480 U.S. at 491 n.21; *Agins*, 447 U.S. at 262 ("The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property."); *Penn Central*, 438 U.S. at 133 n.30. But the notion of "reciprocal advantage" has never been used in a case where the value of property has been totally taken by legislation, and where only a few property-owners are asked to bear the burden of a new, socially-decided preference. *See, e.g., Keystone*, 480 U.S. at 511-12 (Rehnquist, C.J., dissenting); *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting). Indeed, the principle has been limited, by its very terms, to cases where a land-use regulation may impact to *raise* the value of property, and so in fairness the claimant should be barred from reaping the advantage of a regulation she is also challenging. *See Agins*, 447 U.S. at 262 ("In assessing the fairness of [a] zoning ordinance[ ], these benefits must be considered along with any diminution in market value that the appellants might suffer.").

This Court has been cognizant of Justice Holmes's inquiry in *Pennsylvania Coal* of "upon whom the loss of the changes desired [by regulation] should fall." 260 U.S. at 416. As this Court noted in *Armstrong v. United States*, 364 U.S. 40 (1960), the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 49; *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (The Fifth Amendment is intended to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."). At bottom, Petitioner believes that South Carolina's goal of enhancing the public resource of the state's beaches is laudable. But if the state chooses to regulate away the entirety of Petitioner's property interests, then Petitioner is being asked to bear alone a burden the public should gladly take up.

III. JUST BECAUSE A REGULATION IS WITHIN A STATE'S POLICE POWER DOES NOT MEAN THAT COMPENSATION CAN BE DENIED UNDER THE FIFTH AMENDMENT.

A. Not All Police Powers Are Directed Against Nuisances.

The South Carolina Supreme Court held that a mere finding of a legitimate use of a state's police power makes the object of a land-use regulation a nuisance, and thus

immune from compensation under the Takings Guarantee. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991) ("By failing to contest these legislative findings, Lucas concedes that the beach/dune area . . . is an extremely valuable public resource; that the erection of new construction *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."). Petitioner submits that this approach of classifying all police powers as nuisance-directed completely empties the Just Compensation Clause of all meaning. After all, under the Fifth Amendment, *all* takings of private property must be pursuant to legitimate public purposes. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). Denying compensation when the taking is made for the public good makes the Takings Guarantee a license for the government to take by regulation that which it would have to pay for by virtue of an exercise of eminent domain and, in effect, eliminates the concept of inverse condemnation.

To the extent that this Court wants to recognize a nuisance exception, it must be narrowly drawn. Not all legitimate exercises of a state's police power in land-use regulation are directed against public nuisances. This Court has continuously agreed that "the nuisance exception . . . is not coterminous with the police power itself." *Keystone*, 480 U.S. at 491 n.20 (*quoting Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)). Although in *Keystone*, a majority of this Court chose not to make the distinction between police powers and nuisances, this Court did *not* question the principle that legitimate land-

use regulations under police powers need not be invariably directed against nuisances. Instead, the Court seemed to decide only in *Keystone* that the distinction was not important to that case. *Id.* at 490-92.

Cases subsequently interpreting *Keystone* on this point seem to agree that a distinction remains to be drawn between regulations supported by legitimate public policy, and those specifically directed against public nuisances. *See Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161, 166-68 (1990); *Western Energy Co. v. Genie Land Co.*, 737 P.2d 478, 482 (Mont. 1987) ("The [U.S. Supreme] Court has never allowed the nuisance exception to allow complete extinction of a parcel of property.") (paraphrasing *Keystone*, 480 U.S. at 470 (Rehnquist, C.J., dissenting)).

The necessity of this distinction is graphically illustrated in this case. Once again, Petitioner did not question that the Beachfront Management Act was a valid exercise of South Carolina's police power and was a valid land-use regulation. To have raised such a challenge would have been futile and silly. But the question of legitimate land-use regulation is rather different from the inquiry whether the activity being regulated constitutes a public nuisance so as to come within a categorical exception to the Takings Guarantee. Petitioner maintains that the 1988 Act was directed primarily to promoting the public resource of the coastal zone (and not to preventing any perceived public harm), and, in any event, Mr. Lucas's planned construction of homes was not a noxious use of the property qualifying for nuisance regulation without compensation.

B. The South Carolina Act Was Directed More to Promoting a Public Good Than Preventing a Public Harm.

It is important at this stage of the analysis to determine "the character of the governmental action," *Penn Central*, 438 U.S. at 124, featured in the South Carolina legislation. The object of this inquiry is not to determine whether the 1988 Act was made pursuant to South Carolina's legitimate police powers. Rather, the point is to establish whether the regulation was aimed more to promoting a public good in a public resource or to preventing "a property owner from using his property to injure others." *Keystone*, 480 U.S. at 511 (Rehnquist, C.J., dissenting). Only if the regulation's primary purpose is preventing serious public harm emanating from the "misuse or illegal use" of property, *Curtin v. Benson*, 222 U.S. 78, 86 (1911), can it even be argued that the Fifth Amendment does not apply. *See also Orion Corp. v. State*, 747 P.2d 1062, 1078 (Wash. 1987) ("We [have] held that [a] challenged regulation could not effect a[ ] . . . taking, unless the nature of the encumberance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land."), *cert. denied*, 486 U.S. 1022 (1988).

As has already been discussed, the legislative purposes of the 1988 Act were many. Among the perceived assets of the beach/dune system along the South Carolina Coast was in "provid[ing] the basis for a tourism industry," for "provid[ing] a habitat for numerous species of plants and animals," for "protect[ing] life and property by serving as a storm barrier . . . and contribut[ing] to

shoreline stability in an economical and effective manner," as well as "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." 1990 Amendments to Beachfront Management Act, 1990 Act No. 607, § 1(1), *codified at* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990).

It is readily apparent that the underlying purpose of the 1988 Act is to promote tourism and public use on South Carolina's beaches. The passage above emphasizes the recreation values of the shore. Moreover, in actually implementing the forty-year retreat policy, the South Carolina legislature made clear that there would be no effect on beach amenities. *See* 1988 Act, §§ 1(A) & 1(C)(3), *codified at* S.C. CODE ANN. §§ 48-39-290(A) & 48-39-290(C)(3) (Supp. 1990) (allowing fishing piers to be constructed seaward of setback line, provided they were open to the public, as well as noting that nothing in the Act "prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline"). Even when the Act speaks to the problem of beach erosion, the concern seems to be that it negatively impacts on tourism. *See* 1990 Amendments, § 1(5), *codified at* S.C. CODE ANN. § 48-39-250(5) (structures designed to promote beach stability may actually contribute to the "loss of dry sand beach which is so important to the tourism industry.").

Petitioner appreciates the difficulty of determining the primary intent of regulations. As the Supreme Court of Washington has recently noted:

> "We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of

> harm are often present in varying degrees. However, the initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case."

Presbytery of Seattle v. King County, 787 P.2d 907, 912 n.13 (Wash. 1990), *cert. denied*, 111 S.Ct. 284 (1990). Petitioner maintains that South Carolina's beachfront management scheme is primarily devoted to the enhancement of its interest in the "publicly held property" of the state's beaches.

Although the concern of beach erosion harming private property is mentioned in the Act, 1990 Amendments, § 1(4), *codified at* S.C. CODE ANN. § 48-39-250(4) (Supp. 1990), this appears to be a remotely-perceived harm. Indeed, to the extent that the South Carolina legislature was concerned with serious public harm, it was focussed on the damage that erosion might cause to other homes on the beach. It appears that the 1988 Act is not directed against a nuisance at all, but, rather, is intended (by its very language) to convince homeowners to stop living in harm's way.

This same safety justification was advanced by the state of Pennsylvania in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), in order to support its coal subsidence statute, even against homeowners who had agreed to live on top of a mine. *See id.* at 409-11. This contention was roundly rejected by the Court as being paternalistic. *Id.* at 415 ("If [the homeowners] had been so shortsighted as to acquire only surface rights without the right of support, we see no more authority for [Pennsylvania] supplying the latter without compensation than there was for taking

the right of way in the first place and refusing to pay for it because the public wanted it very much.").

To the extent that the South Carolina legislature might have been bothered by the impact of coastal erosion on property, it, too, would be advancing a paternalistic ground for characterizing the construction of beachfront homes as nuisances. The 1988 Act deserves no deference in this inquiry concerning the underlying purpose of the regulation in preventing serious public harm. As Justice Holmes noted in *Pennsylvania Coal*, "[t]he greatest weight [in these cases] is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." 260 U.S. at 413. While this inquiry may be premised on the substantive due process standard of *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals"), a court must objectively find that the regulation is actually being directed against a nuisance. It is not enough for the legislature to so declare.

C. Construction of a Home Cannot be Considered a Nuisance.

The class of public harms that fall within the traditional ambit of the nuisance exception has been quite small. As suggested earlier in this brief, *supra* at 12-14, the periods before the decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), and after *Pennsylvania Coal v. Mahon*, 260

U.S. 393 (1922), are of particular significance in identifying cases in which any nuisance exception was applied as a condition on the Takings Guarantee.[9] Some earlier cases denied a landowner compensation when the subject activity was a *per se* nuisance. *See, e.g., Wynehamer v. The People,* 13 N.Y. 378, 454 (1856) (articulating this rule but still striking down a statute characterizing intoxicants as a public nuisance *per se*). A *per se* nuisance is a use in its inherent nature so hazardous as to make the danger of extreme and serious injury so probable as to be almost a certainty. *See Jager v. First National Bank,* 7 A.2d 919 (Conn. 1939) (*citing Melker v. New York,* 83 N.E. 565, 567 (N.Y. 1908)). A few courts went further and held that a land-use activity had to be a nuisance *in fact*; it was not enough to show that there was some extreme (but still hypothetical) harm. In *Commonwealth v. Tewksbury,* 52 Mass. (11 Met.) 55 (1846), the Massachusetts Supreme Judicial Court held that compensation would only be denied in cases where the regulation is directed against an activity which is "injurious to the public," and only in cases "[a]mounting to an obvious public exigency." *Id.* at 57-58.

Post-*Pennsylvania Coal* cases have tried to return to a narrower view of nuisances as being those activities

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[9] Between *Mugler* and *Pennsylvania Coal* was a period in which regulatory takings cases were decided under due process standards, which, as noted above, gave substantial deference to state regulation.

The Fifth Amendment's Takings Guarantee was first applied against the states by this Court in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897). Of course, many state constitutions featured a similar Just Compensation clause. *See* Connors, *supra* note 1, at 149-50.

which injure others. *See Keystone,* 480 U.S. at 511-12 (Rehnquist, C.J., dissenting) (the nuisance exception applies only "where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others."). This Court in *Miller v. Schoene,* 276 U.S. 272 (1928), declined to make the determination whether an activity (the keeping of diseased cedar trees that endangered nearby apple growers) was a "nuisance according to the common law." *Id.* at 280; *see also Goldblatt v. Hempstead,* 369 U.S. 590, 593 (1962) (question whether activity was a common law nuisance not "controlling").

Petitioner agrees that the determination of an activity as a public nuisance under the common law is largely irrelevant. All that characterization meant was that the activity was punishable as a crime. *See Prosser and Keeton on the Law of Torts* 645-46 (5th ed. 1984). Rather, the question must be whether the harm being addressed by the regulation is truly of public concern and is of a magnitude and imminence to consider any categorical denial of compensation. As this Court has ruled in cases of property taken in times of emergency, public necessity must be clearly and convincingly demonstrated before compensation will be denied. *See, e.g., United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958) (no compensation for shutdown of gold mine during World War II); *Bowditch v. Boston,* 101 U.S. 16 (1879) (private property destroyed to contain fire).

The Petitioner's planned construction of homes on the two coastal lots cannot seriously be maintained as a "serious public harm," as the South Carolina Supreme Court held. *See Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 899 (S.C. 1991). The South Carolina legislature, in drafting the 1988 Act (and in the 1990

Amendments), did not really contend that beachfront homes posed a threat to neighboring property and individual safety. Indeed, as has already been noted,

> "the [1988] Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that [the South Carolina] claimants' residences are not dire threats to public safety and welfare. A 'public nuisance' ought to be abated, not phased out through a half-lifetime of attrition."

Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 n.2 (4th Cir. 1991) (Hall, J., dissenting). The construction of beach bungalows does not pose an imminent threat of danger to public interests.

Moreover, living in a home cannot really be considered a "noxious" use of land, as that term was used in *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). While in the past, statutes have declared (and courts confirmed) certain structures to be public nuisances, this has been solely attributable to illegal or immoral conduct occurring inside. *See, e.g., Black v. Circuit Court of Eighth Judicial District*, 101 N.W.2d 520 (S.D. 1960) (prostitution); *Brown v. Perkins*, 78 Mass. (12 Gray) 89 (1858) (illegal liquor establishment); *State ex rel. Williams v. Karston*, 187 S.W.2d 327 (Ark. 1945) (gambling). There is no case which suggests that simply residing in a house constitutes a public nuisance.

It bears repeating again that the South Carolina Supreme Court did not make a specific finding that Mr. Lucas's intended use of his property constituted a nuisance. Rather, that court simply took Petitioner's concession that the 1988 Act was a legitimate exercise of police power and twisted this into an admission that building a home on the beach was a noxious use of property. *Lucas*, 404 S.E.2d at 898, 900. If the South Carolina Supreme

Court's decision is not overturned it will mean that a mere showing of legitimate exercise of police power in land-use regulation, without any concomitant inquiry into the intended use of the parcel and the economic impact of the regulation upon the owner, will suffice in denying just compensation under the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court in this matter should be REVERSED.

Respectfully submitted,

A. Camden Lewis
Counsel of Record
Lewis, Babcock & Hawkins
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Gerald M. Finkel
Attorney for Petitioner
Finkel, Goldberg, Sheftman & Altman
P.O. Box 1799
Columbia, South Carolina 29202

David J. Bederman
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

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